(2024) 03 ITAT CK 0084

Income Tax Appellate Tribunal (Delhi A Bench)

Case No: Income Tax Appeal No. 250 To 254, 255 To 259, 260 To 264, 480 To 484, 485 To 489, 490 To 494, 550 To 554, 560 To 564, 541, 565 To 569, 529, 570 To 575, 542, 583, 413 To 417, 458 To 462, 463 To 467, 468 To 472, 77 To 81, 555 To 559, 418 To 422, 423 To 427,

HCL Technologies Malaysia SDN BHD (Formerly Known As HCL Axon Malaysia SDN BHD)	APPELLANT
Vs	
ACIT	RESPONDENT

Date of Decision: March 29, 2024

Acts Referred:

- Income Tax Act, 1961 - Section 9(1)(vii), 9(1)(vii)(b), 133A, 144C(5), 144C(10), 147, 148, 194I, 254(2)

Hon'ble Judges: G.S. Pannu, (VP); Anubhav Sharma, J

Bench: Division Bench

Advocate: Ajay Vohra, Neeraj Jain, Aditya Vohra, Arpit Goyal, Vizay B. Vasanta

Final Decision: Allowed

Judgement

1. These are appeals preferred by different, but, related assessees (referred here in after as ‘appellants’ or ‘assessee’) against the final orders of the Assessing Officer, Circle, International Taxation 2(1)(1) for assessment years 2012-13 and 2013-14 to 2017-18. Identical issues are involved in these appeals and hence, they are taken up together and disposed of by this common order.

2. The facts, in brief, are that a survey operation was carried out in the premises of HCL Technologies Limited (in short, HCLT), Noida u/s 133A of the Act. The Revenue examined certain remittances which were made by HCLT to various assessees who are associated enterprises (foreign AEs) of HCLT. The Revenue alleges that these payments were as ‘Fee for Technical Services’ in the hands of all the appellant/assessee and, thus,

taxable u/s 9(1)(vii) of the Income Tax Act 1961 (here in after mentioned as 'the Act') and that there was a failure on the part of the HCLT in deducting the tax at source. The cases of the appellants were reopened by issuance of notice u/s 148 of the Act. During the course of reassessment proceedings, the draft assessment order was passed wherein the amount received by the assessee was held to be taxable as 'Fee for technical services.' u/s 9(1)(vii) of the Act and also under the Double Taxation Avoidance Agreement. The assessee filed objections before the DRP wherein partial relief was granted and, subsequently, the impugned final assessment orders were passed for which the assessee are in appeal.

2.1 The case set up by the appellants is that they and HCLT are part of the HCL group with the assessee being subsidiaries and associated enterprises of HCLT. The HCL America (HCLA) provides service to clients of HCLT outside India as per agreement entered into with the HCLT. The assessee companies provide marketing and sales support as well as on site services. The services of the HCL group are primarily categorized in following line of business:-

i) Software services including engineering services;

ii) Infrastructure services; and

iii) Business process outsourcing

2.2 Software, Engineering and Infrastructure Services are provided to the customers located outside India under a Global Delivery Model wherein services are provided partly from India (offshore services) and partly from the office of the assessee or at the client's location (onsite services). The onsite services are also provided through the near shore development centers. The onsite services, requiring physical presence of Engineers onsite due to customer preferences / security reasons/ time zone requirements, are performed by the employees of the assessee either at customer location or nearshore delivery centers.

2.3 Under the Software Services category, both the onsite and offsite services are delivered to the customer directly. The employees of HCLT as well as the assessee provide services in a very secure IT environment, wherein both the teams access the customer's server directly and write the software codes on such server. The assessee generally works from the customer's location with direct coordination with them.

2.4 In the Software / Application design (mostly by HCLT), the software program is broken down into modules for coding. A single team, either HCLT or the assessee, provides end to end development services on a specific module of the software directly on customer's server. Accordingly, no software code comes to India in tangible or intangible form (email etc). All documentation, design and codes are directly captured in the customer code repository residing in customer's server located outside India and

the working team, both HCLT and the assessee, work directly on the customer's server. The service deliverables are directly transferred to the customers located outside India. HCLT and the assessee serve independently to the customer with coordination between them regarding the project.

2.5 In this background, it is submitted that under a Global Delivery Model, the assessee performs services outside India in connection with contracts entered into by HCLT with foreign customers. No service or deliverable is provided by the assessee to HCLT and work is directly performed onsite at the foreign customer's location or near shore delivery centers. Accordingly, it is claimed that the assessee does not provide any services to HCLT and that the services are rendered by the assessee directly to the customers located outside India. It is the case of assessee that no part of the services rendered by the assessee, are transferred to India. As per the business model, the onsite services are entirely performed by the assessee from outside India and delivered for ultimate consumption or utilization by foreign clients in their business outside India and both entities perform work directly on the server of the foreign customers.

2.6 It is not in dispute that the assessee furnished before the ld. AO the income tax return filed with the foreign tax authorities and the copy of tax residency certificate (TRC) issued by the competent authority for the relevant year.

3. Heard and perused the record.

3.1 At the time of hearing, the ld. Sr. Counsel submitted that the bunch of these appeals arise out of certain common questions of law and fact, in regard to which, in ITA No.537/Del/2021 and others vide order dated 20.12.2023, in the cases of 17 associated enterprises (Foreign AEs) of HCL Technologies Ltd. (HCLT), the coordinate Bench has decided in regard to non-taxability in India of receipts of foreign AEs from HCLT. The ld. DR has tried to distinguish all facts submitting that there were certain evidences which were before the Bench, but, not considered and the Revenue is in the process of filing a Miscellaneous Application for rectification of the order u/s 254(2) of the Act.

4. Now what comes up from the material before us and submissions is that various contracts/agreements have been signed between the parties. However, it is primarily a Master Service Agreement which is relied by the assessee and the coordinate Bench in ITA No.537/Del/2021 and others (supra) has construed the same and concluded, in para 15, page 35-37 as follows:-

"15. From the perusal of the Master Service Agreement wherein certain relevant clauses have already been reproduced above, we find that as per clause 5, the assessee has the primary responsibility for performance of software and IT services in respect of agreements entered into with overseas customers of HCL

Group ; that as per clause 7, the assessee and HCLT acknowledge that performance of obligations under the Master Service Agreement may result in discovery, creation or development of inventions, methods, techniques, improvements, software designs, computer programs, strategies, data and other original works of authorship, which shall fully vest with the assessee on creation and be the property of the assessee and it is also acknowledged that the existing Intellectual Property Rights of the assessee, including any modifications or enhancements thereto that may be developed in the course of providing services under the Master Service Agreement would remain under the exclusive ownership of the assessee; that in case of default on the part of the assessee in performance of services, clause 11 of the Master Services Agreement unequivocally provides that the liability shall vest with the assessee itself ; that in case any damages, claims, demands, liabilities, costs and expenses arise due to errors or performance problems of the assessee's employees, clause 12 of Master Service Agreement again fixes the liability on the assessee to indemnify HCLT, unconditionally and irrevocably ; that clause 13 of the Master Service Agreement further establishes that both parties, i.e., the assessee and HCLT are independent contractors and no party has supervisory power over the other. We find that this agreement is the foundation defining the scope of services to be performed by the assessee and HCLT duly defining their respective obligations to the overseas customers. We find that this agreement has not been treated by the revenue as sham or an agreement entered into for the purpose of evasion of tax. Rather the revenue has taken cognizance of this agreement and had only interpreted the contents thereon in a different manner so as to bring the activities carried out by the assessee within the ambit of domestic taxation as well as taxability under the Treaty. In our considered opinion, under the Global Delivery model, HCL group entities operate as independent contractors and services are not rendered by one entity to another. While the assessee performs services outside India in connection with contracts entered into by HCLT with foreign customers, no service or deliverable is provided by the assessee to HCLT and work is directly performed onsite at the foreign customer's location or near shore delivery centers. In other words, the assessee does not provide any services to HCLT and the services are rendered by the assessee directly to the customers located outside India, i.e., no part of the services rendered by the assessee are transferred to India. Thus, as per the business model, the on-site services are entirely performed by the assessee from outside India and delivered for ultimate consumption or utilization by foreign clients in their business outside India. Accordingly, we appreciate the arguments of the ld. AR that the overall responsibility with HCLT is only to facilitate common linkage between HCLT, HCL group entities and customers and that the fact that HCLT is the facilitator or

single contact point for the end customer does not lead to the conclusion that services are being provided by the assessee to HCLT ; that such arrangement is entirely meant for administrative convenience of the end customers, so as to circumvent the need to approach multiple entities time and again for the desired services. All the services are facilitated from one place by HCLT, which acts like the leader in a consortium. We are of the considered opinion that the Master Service Agreement entered into between HCLT and the assessee, including other HCL group entities is in the nature of a business arrangement, by which the dominant intention Page | 36 of the parties to come together and serve the overseas customers is fulfilled. Receipt of payment from the overseas customer by HCLT which further distributes the same to the group entities, including the assessee, for their share of the work, cannot be held to be income in the hands of the assessee and liable to tax in India. In our view, the payment received by the assessee from HCLT is only in the nature of revenue share and should not be construed to mean that services were provided by the assessee to HCLT. This view of ours is further fortified by the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs NIIT Ltd reported in 318 ITR 289 (Del). It would be relevant to address the primary facts and dispute that arose in the case of NIIT Ltd to understand as to how the said decision applies to the facts of the present case before us. In the case of NIIT Ltd, it was engaged in business of providing computer education and training and had entered into agreements with franchisees for running education centers at various metro cities. Under the said agreements, franchisees were providing NIIT courses under license from the assessee and the franchisees were to pool their independent resources for purpose of providing computer education to students and were further required to provide infrastructure facilities like classroom facility, equipment, furniture, fixture, administrative set-up, etc. Fees collected from students were deposited in the account of NIIT and then the same was shared with the franchisees in accordance with the terms of the franchisee agreement. NIIT for the purpose of its convenience had categorized the said fees shared as marketing claim and infrastructure claim. The assessing officer treated infrastructure claim paid to franchisees as rent paid and held that NIIT was liable to deduct tax therefrom u/s 194-1 of the Act. The Hon'ble Delhi High Court, affirming the decision of the Tribunal, held that having regard to the intent of the parties in coming together and the dominant purpose, the arrangement between the parties was a franchisee agreement and not a lease agreement; accordingly, it could not be said that rent was being paid by NIIT to the franchisees."

5. It can be concluded that the coordinate Bench has concluded as under:-

i. That the Master Service Agreement entered into between HCLT and the foreign AEs is in the nature of a business arrangement, by which the dominant intention of the parties to come together and serve the overseas customers is fulfilled;

ii. That HCLT was merely distributing the receipt of payment from the overseas customer to the group entities for their share of the work; and

iii. That the payment received by the foreign AEs from HCLT was only in the nature of revenue sharing and cannot be construed to mean that services were provided by the foreign AEs to HCLT.

6. The Co-ordinate Bench further held that both HCLT and the foreign AEs are jointly rendering services to the customers located outside India; billing is done on a consolidated basis on the customer by HCLT (including the services rendered by the foreign AEs to the customer located outside India); payments are received by HCLT from the customer located outside India and thereafter, revenue is shared by HCLT with the foreign AEs for the proportionate volume of services rendered by the foreign AEs to the customer. It will be appropriate to reproduce the relevant observation here in below;

"22. In our considered opinion, the broad perusal of the agreements entered into between the parties clearly postulate a situation that both HCLT and the assessee are jointly rendering services to the customer located outside India ; billing is done on a consolidated basis on the customer by HCLT (including the services rendered by the assessee to the customer located outside India) ; payments are received by HCLT from the customer located outside India and thereafter the revenue is shared by the HCLT with the assessee for the proportionate volume of services rendered by the assessee to the customer. It is effectively the sharing of revenue between HCLT and the assessee qua the customer located outside India. HCLT is answerable to the client located outside India and the assessee is answerable to HCLT for any mistakes pursuant to indemnification clause agreed upon in their agreement. Further the agreement with Cisco and Deutsche Bank (which had been considered by the ld. AO) specifically prohibits sub-contracting activity by the HCLT. However, the said agreement permit HCLT to use the services of its affiliates situated across the globe for rendition of services in a seamless and smooth manner.

7. The Co-ordinate Bench further noted that the assessing officer erred in holding that the services were rendered by foreign AEs to HCLT and the said findings of the AO are contrary to the binding directions of the DRP of the order wherein DRP held that major part of module development and writing of codes on software application is carried out by HCLT and only some of it is being done by foreign AEs; that both HCLT and foreign AEs are working together on the server of the client to develop the final product. It will

be appropriate to reproduce the relevant observation here in below;

“23. We find that the ld. DRP vide para 3.3.7. of its directions u/s 144C(5) of the Act had stated as under:-

“3.3.7. In brief, both HCLT and the assessee (HCL Singapore Pte Ltd.) work on the server of the client. Major part of the development of modules and writing of the software application codes is carried out by HCLT and some part of it is being done by Page | 45 the assessee (HCL Singapore Pte Ltd.). Both the HCLT and the assessee (HCL Singapore Pte Ltd.) are working together on the server of the client to develop a final product which is to be delivered to the client.”

23.1. In view of the above, we find the allegation leveled by the ld. AO in his order that services were rendered by assessee to HCLT is in direct contravention to the findings recorded by the ld. DRP. Needless to mention that the observations of the ld. DRP are binding on the ld. AO as per section 144C(10) of the Act.

8. The Coordinate Bench after analyzing the statements of employees recorded in survey proceedings held that the same actually support the contentions of the foreign AEs. The Bench held that on analysis of the statements in a holistic manner, it was clear that that both onsite and offsite personnel of the foreign AEs and HCLT respectively were responsible for writing the code; that the respective teams of the foreign AEs and HCLT work directly with the foreign customer's managers; that in majority of the projects, the entire development environment is owned by foreign customer; that the code and test scripts are worked on from foreign customers' servers and provided directly on the said servers; that the integration is normally done through customer build machines that integrate the various units of code into a solution. It was, accordingly, held that payments made by HCLT to the foreign AEs could not be construed as FTS. It will be appropriate to reproduce the relevant observation here in below;

“33. From the perusal of the aforesaid statements of various employees which were recorded during the course of survey by the TDS officers, which were heavily relied upon by the ld. AO by cherry picking some of the questions and answers alone given by them, we find that prima facie all the statements of employees actually support the contentions of the assessee herein. From the aforesaid statements, it emerges that the offshore project lead or project manager of HCLT manages his offshore team in India, whereas the assessee's project lead manages his team independently, which executes work from the overseas locations directly on the customer's server. Both the project managers/ leads only coordinate with each other on need basis; that each team of HCLT and the assessee develops the particular modules as assigned to them; that the delivery team of the assessee reports to the delivery manager who sits in the foreign country and the delivery

team of HCLT reports to the delivery manager who sits in India; that both onsite and offsite personnel of the assessee and HCLT respectively are responsible for writing the code; that the offshore teams of HCLT work directly with customer managers or through project managers in India and the onsite team engineers belonging to the assessee company work directly with foreign customer's managers; that in majority of the projects, the entire development environment is owned by foreign customer; that the code and test scripts are worked on from foreign customers' servers and provided directly on the said servers; that the integration is normally done through Customer build machines that integrate the various units of code into a solution.

8.1 Then, with regard to the ground common to all the appeals relating to HCL group entities operate as a consortium and services are not rendered by one entity to another is decided in all appeals in favour of appellants.

9. As with regard to the alternative ground of the assessee, the coordinate Bench has observed in para 24 of page 46 as follows:-

"24. We further find that if the contention of the ld. AO i.e., the amount paid to the assessee by HCLT is to be considered towards the onsite software services provided by HCLT in the course of carrying on its business of onsite services were to be accepted, such business of providing onsite services would be considered as outsourced by HCLT to the assessee. Such business of providing onsite services is carried on outside India, in as much as such onsite services are performed outside India and is also delivered directly to the customers outside India. HCLT as a corollary would be considered as having availed the services of the assessee outside India in respect of and for the purpose of business of providing such onsite services to the customer outside India. Therefore, the amount paid by HCLT to the assessee is for the services utilized for business of onsite services carried on by HCLT outside India. Thus, such receipts in the hands of the assessee would not be taxable in India in view of first limb of the exception carved out in clause (b) of section 9(1)(vii) of the Act and cannot be deemed to accrue or arise in India.

10. The ld. Sr. Counsel has also pointed out that the coordinate Bench has kept the following issues open:-

Re: (IV)Taxability under the DTAAs - No findings returned

1. The Bench has held that since receipts of the foreign AEs from HCLT are held to be not taxable in India under the provisions of the Act, the grounds raised qua taxability of the impugned receipts under the DTAAs were rendered academic in nature; no findings were returned and the same were left open for determination.(Para no.35, Page No.67)

Re: (V) Receipts in connection with Infrastructure Services

2. The Bench noted that they have already held receipts of foreign AEs from HCLT to be not taxable in India. It was further held that the receipts towards Infrastructure Services were also not chargeable to tax in India since no technical knowledge, experience, skill, knowhow or process is made available by the foreign AEs to HCLT and in absence of Permanent Establishment of the foreign AEs in India, payments received by them could not be brought to tax in India even as per the applicable DTAA.(Para no.42, Page No.73)

Re: (VI) Validity of assumption of jurisdiction under section 147 of the Act

3. The Bench held that since the case has been dealt on merits, the grounds qua validity of assumption of jurisdiction under section 147 of the Act are rendered academic and are left open for determination.(Para no.46, Page No.74-75)

11. Further, the ld. Sr. Counsel has pointed out that there are certain other issues which are common in the appeals. He submitted that they are also rendered academic and be kept open. As for convenient reference these issues are tabulated below:-

(i) Tax computed on assessed income at higher rate than as prescribed in the Act or DTAA

S. No.	Name of the Company	AYs	ITA No.
1.	HCL (Brazil) Technologia da informacaoLtda	2014-15	414/DEL/2023
2.	HCL (Brazil) Technologia da informacaoLtda	2015-16	415/DEL/2023
8.	HCL Technologies Belgium BVBA (Successor to HCL Belgium N.V.)	2014-15	454/DEL/2023
9.	HCL Technologies Belgium BVBA (Successor to HCL Belgium N.V.)	2015-16	455/DEL/2023
12.	HCL Technologies Sweden AB (successor of HCL Sweden AB)	2014-15	464/DEL/2023
13.	HCL Technologies Sweden AB (successor of HCL Sweden AB)	2015-16	465/DEL/2023
18.	HCL Technologies Italy S.P.A. (Successor to HCL Italy S.R.L.)	2014-15	486/DEL/2023
19.	HCL Technologies Italy S.P.A. (Successor to HCL Italy S.R.L.)	2015-16	487/DEL/2023
20.	HCL Canada Inc (Formerly known as HCL Axon Technologies Inc)	2014-15	491/DEL/2023
21.	HCL Canada Inc (Formerly known as HCL Axon Technologies Inc)	2015-16	492/DEL/2023
24.	HCL Singapore Pte Ltd	2014-15	556/DEL/2023

(ii) Set-off of amount of reversal of receipts for infrastructure services not given in draft assessment order

4.	HCL Technologies Sweden AB (successor of HCL Sweden AB)	2017-18	467/DEL/2023
6.	HCL Technologies Italy S.P.A. (Successor to HCL Italy S.R.L.)	2017-18	489/DEL/2023
7.	HCL Canada Inc (Formerly known as HCL Axon Technologies Inc)	2017-18	494/DEL/2023

(iii) Final Assessment Order passed in the name of non-existing entity

		2013-14	414/DEL/2023

(iv) Education cess and surcharge is levied on income-tax determined under the provisions of the DTAA in all the captioned appeals except the following appeals

11.1 These are left open as the applicability of Treaty has not been adjudicated.

11.2 As with regard to the amount received by the Appellant for rendering BPO services included in assessed income, issues are common in following years:-

11.3 It was submitted that in all other cases, the assessing officer has not assessed to tax the receipts of the foreign AEs in respect of BPO services. Only in the impugned orders passed in the aforesaid 3 cases, payments towards BPO services have also been brought to tax. It is submitted that addition in respect of the same deserves to be deleted on the same reasons as the ones recorded by the Hon'ble Tribunal in order dated 20.12.2023 passed in the case of foreign AEs. We concur to the same.

12. As a consequence, all the appeals in hand are allowed with consequences to follow as per the determination of the issues, as determined in favour of appellants or as left open.